Nos. 193 and 194

In the Supreme Court of the United States

OCTOBER TERM, 1952

FORD MOTOR COMPANY, PETITIONER

v.

GEORGE HUFFMAN, ET AL.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, PETITIONER

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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OPINIONS BELOW

The order of the United States District Court for the Western District of Kentucky denying respondent's motion and granting petitioners' motions for summary judgment (R. 26) is un-

reported. The opinion of the Court of Appeals for the Sixth Circuit (R. 30–38) is reported at 195 F. 2d 170.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1254. The petitions for certiorari were granted on October 13, 1952.

QUESTION PRESENTED

This brief discusses only a single question raised by the petitioning union (No. 194, Pet. p. 2), namely, whether an exclusive bargaining representative commits an unfair labor practice, which the Board has exclusive jurisdiction to remedy, by causing the layoff of particular employees in the bargaining unit in violation of its duty to represent all employees within the bargaining unit fairly and without discrimination.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V., 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 22–23.

STATEMENT

The collective bargaining agreement between the Ford Motor Company, petitioner in No. 193, and the Union, petitioner in No. 194, which covered employees at the Ford plant in Louisville, Kentucky, provided, *inter alia*, that full seniority credit should be given employees for periods

of military service even in the absence of employment at Ford prior to such military service (R. 6, 13, 14, 16–17, 20). On February 21, 1951, respondent Huffman, a Ford employee subject to the contract, filed a complaint in the federal district court, for himself and other employees similarly situated, against Ford and the petitioning Union, requesting a declaratory judgment and injunctive relief for the purpose of invalidating this seniority clause (R. 2–9). The complaint alleged that this provision constituted an unwarranted discrimination against employees whose employment at Ford, like his own, was interrupted by military service, and in favor of employees who had no prior employment record at Ford, but who, because of lengthy military service, were awarded greater seniority and for that reason were in a preferred position when layoffs were made (R. 5–8). Thus, according to the complaint, Huffman and other employees who had accumulated seniority before their military service had frequently been laid off while employees with no previous employment record at Ford, but having greater military service, had continued to work (R. 7–8).

On motions for summary judgment filed by all parties, the district court dismissed the complaint, stating in its order that "The Court finds that said collective bargaining agreement sets up a seniority system which the Court deems not to be arbitrary, discriminatory, or in any respect unlawful" (R. 26).

The court of appeals reversed, holding that the seniority agreement was an invasion of employees' rights under Section 7 of the Act "to bargain collectively through representatives of their own choosing" (R. 36). The court held that this provision "means that in entering into labor contracts the bargainers must make their agreements with a view to the rights of the entire group bound by them, and not enter into agreements which discriminate against one part for the benefit of another" (R. 36). Applying this principle, the court held that the right of Huffman and others in his class to fair representation was violated in this case because the seniority provision incorporated standards which were based on factors having "no relevance to terms and conditions of work or the normal and usual subjects of contracts between union and employer" (R. 37). In support of this holding the court below (R. 37) relied on *Steele* v. *L. & N. Ry. Co.*, 323 U. S. 192, where this Court held that the duty imposed on the exclusive bargaining agent by the Railway Labor Act not to discriminate against employees in the unit it represented was violated by execution of a collective agreement which differentiated for purposes of employment opportunity on grounds of race.

The court remanded the case to the district court "for further proceedings in accordance with [its] opinion" (R. 38).

DISCUSSION

INTRODUCTION

The sole question in which the Board is interested—whether the Board has exclusive jurisdiction of a complaint which alleges that an exclusive bargaining agent has violated its duty to represent all of its constituents fairly within the meaning of the *Steele* case—is presented on this record by the holding of the court below that the military service standard used in this case for determining seniority is, like a racial standard, one which the *Steele* case precludes an exclusive bargaining agent from adopting, and that application of such a standard violates rights guaranteed employees by Section 7 of the National Labor Relations Act. The Board takes no position on the question whether, in holding the military service standard unfair and discriminatory, the court below properly construed and applied the principles enunciated in the *Steele* decision. If the Court should hold that, where violation by an exclusive bargaining agent of its duty under the *Steele* case results in loss of employment by members of the bargaining unit, the Board has exclusive primary jurisdiction to remedy such violation, then, the Board believes, the question whether adoption of a particular standard constitutes a violation of the duty to accord fair and equal representation should be passed upon by it initially in its quasi-judicial capacity. If, on

the other hand, this Court should hold that the federal district courts are empowered to exercise jurisdiction over violations of this character, the Board does not believe that it should express an opinion on the question whether, on the facts of this case, the petitioning union was properly held to have violated the obligation it owed to members of the bargaining unit under the doctrine of the *Steele* case.

We have set out below the difficulties which, in the Board's opinion, are involved in resolution of the jurisdictional question, and the considerations which the Board believes are relevant in determining whether Congress intended to vest in the Board exclusive primary jurisdiction over controversies of this character. The Board has not heretofore been faced with the necessity of answering this question, and in its view the relevant considerations do not point clearly to a definitive answer. The Board desires, therefore, merely to make it clear that if this Court should decide that it is an unfair labor practice for a labor organization to violate its duty under the *Steele* case, then it is the Board's position that the Board, and not the federal district court, would have primary jurisdiction to remedy such violations.

DOES VIOLATION BY AN EXCLUSIVE BARGAINING AGENT OF ITS DUTY TO REPRESENT FAIRLY AND EQUALLY ALL EMPLOYEES IN THE BARGAINING UNIT CONSTITUTE AN UNFAIR LABOR PRACTICE WITHIN THE MEANING OF SECTION 8 (b) (1) (A), 8 (b) (3), OR 8 (a) (1) OF THE ACT?

Like the Railway Labor Act, the National Labor Relations Act imposes on a labor organization which enjoys the statutory status of exclusive bargaining agent, an obligation to represent all employees in the bargaining unit fairly and without discrimination. *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248, 255; *Hunt* v. *Crumboch*, 325 U. S. 821, 826; compare *Steele* v. *Louisville & Nashville Ry. Co.*, 323 U. S. 192, n. 3, p. 202. The court below held that Section 7 of the National Labor Relations Act guarantees to employees a corresponding right to be free from discriminatory representation. Under the Railway Labor Act the right to nondiscriminatory representation, like other employee rights guaranteed by that Act, is enforcible through the district courts.[1] This conclusion follows the fact that there is no administrative procedure under the Railway Labor Act for enforcing or vindicating the rights it guarantees employees.

[1] *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515; *Texas & N. O. Ry. Co.* v. *Brotherhood*, 281 U. S. 548.

Steele case, 323 U. S., at pp. 205–207. Under the National Labor Relations Act, however, invasion by employers or labor organizations of rights guaranteed employees in Section 7 is declared to be an unfair labor practice, and such unfair labor practices are remediable in administrative proceedings before the Board. The court below, however, apparently did not consider whether, in view of this difference in scheme and structure between the Railway Labor Act and the National Labor Relations Act, the Board rather than the district courts should have primary jurisdiction to remedy violations of the right, under the National Labor Relations Act, to non-discriminatory representation. Cf. *Far East Conference* v. *United States*, 342 U. S. 570, 573–576; and cases cited. Without discussion of this question the court assumed that the complainant in this case was entitled to seek redress in the federal district court.

In the Board's view, the question whether the district courts have jurisdiction of actions of the kind involved in this case depends on the resolution of two subsidiary issues: (1) does Section 7 of the Act guarantee to employees the right not to be unfairly discriminated against (within the meaning of the *Steele* case) by their bargaining representative, and (2) is it an unfair labor practice for an exclusive bargaining agent to procure the layoff or discharge of employees on a basis which is unfair within the meaning of

the *Steele* case, and for an employer to make a layoff or discharge as a result of such misuse by the bargaining agent of its statutory authority? If both of these questions are answered in the affirmative, then, for the reasons recently reiterated in this Court's opinion in *Nathanson, Trustee* v. *National Labor Relations Board,* decided November 10, 1952, the Board believes that the district courts should be held to lack jurisdiction to remedy, in actions by employees, violations of the duty of exclusive bargaining representatives to accord fair and equal representation. On the other hand, if the second question is answered in the negative, then the Act provides no adequate remedy for violation of an exclusive bargaining agent's duty to constituents, and the Board believes that the federal district courts should be held to have jurisdiction to afford redress, just as they have jurisdiction to redress similar violations under the Railway Labor Act.

A. *The scope of Section 7*

This Court has held that the implied duty not to discriminate unfairly against any employees within the bargaining unit arises as the result of conferring statutory power upon a union, as exclusive representative, to bind all employees within the bargaining unit to contractual arrangements made with employers. As the Court stated in *Steele,* 323 U. S., at p. 204, "So long as a labor

union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the [unit] * * * without hostile discrimination, fairly, impartially, and in good faith." See also *Wallace Corp.* v. *National Labor Relations Board,* 323 U. S. 248, 255.

In the Railway Labor Act, the principal provision which grants exclusive authority to the representative chosen by the majority of employees to act for all employees within the unit is Section 2, Fourth, which reads as follows (quoted in 323 U. S., at p. 199):

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. * * *

In addition, Section 2, Sixth, and Seventh, provide that the representative may bargain for "the working conditions of employees 'as a class,' " and Section 1, Sixth defines " 'representative' as meaning 'Any person or * * * labor union * * * designated [by employees] to act * * * for them' " (*ibid.*).

The counterpart of these majority rule provisions in the National Labor Relations Act may

be found in most explicit form in Section 9 (a), which reads in applicable part, "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. * * *" In addition, however, Section 7 of the Act, in language nearly identical with that found in Section 2 Fourth of the Railway Labor Act (p. 10, *supra*), provides that "Employees shall have the right to self-organization * * * [and] to bargain collectively through representatives of their own choosing. * * *" To sustain the holding of the court below that Section 7 confers upon employees the right not to be unfairly discriminated against by their representative, the quoted portion of this Section must be read to comprehend the right to bargain through a representative which does not improperly discriminate. Put otherwise, discriminatory representation, in the view of the court below, prevents employees from enjoying true collective bargaining. The validity of this analysis need not rest upon the assumption that Section 7, taken by itself, confers on the representative chosen by the majority of the employees an exclusive bargaining status. For in guaranteeing employees the right to "bargain" through a "representative," Section 7, to be consistent with other parts of the statute, clearly

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: * * *

* * * * *

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9 (a);

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

* * * * *

(c) The testimony taken by such members, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hearing argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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U. S. GOVERNMENT PRINTING OFFICE: 1937

BRIEF FOR THE C.I.O. AS AMICUS CURIAE

No. 194

IN THE

Supreme Court of the United States

October Term, 1952

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, *Petitioner*

vs.

GEORGE HUFFMAN, INDIVIDUALLY, ETC., ET AL., *Respondent*

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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contemplates that the "representative" shall have authority to bargain on behalf of all.[2]

B. *The scope of Section 8 (b) (1) (A) and 8 (a) (1)*

The importance of deciding whether Section 7 comprehends the right of employees to nondiscriminatory representation arises from the fact that Section 8 (b) (1) (A) declares it to be an unfair labor practice for a labor organization to "restrain" or "coerce" employees "in the exercise of the rights guaranteed in Section 7." Accordingly, if the right to nondiscriminatory representation is guaranteed by Section 7, and if discriminatory conduct by a bargaining agent which results in layoff or other economic detriment to employees may be said to "restrain" or "coerce" employees in the exercise of that right, then such conduct amounts to an unfair labor practice within the meaning of Section 8 (b) (1) (A). Moreover, Section 8 (a) (1) prohibits employers from interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7. Thus, if a labor organization violates rights guaranteed by Section 7

[2] Thus, an employer who is willing to recognize a union as the representative of its members, but not as exclusive representative for the entire bargaining unit, restrains and coerces employees in the exercise of their rights guaranteed by Section 7 of the Act. See, *e. g.*, *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 383–384; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 683–684.

when, in violation of its duty under the *Steele* case, it induces an employer to lay off or discharge members of the bargaining unit on an unfair or discriminatory basis, it would follow that the employer, by acquiescing in the union's misuse of its bargaining powers, and affecting the job status of employees pursuant thereto, would thereby infringe rights protected by Section 7, in violation of Section 8 (a) (1).[3]

The Board has never had occasion to decide whether a labor organization which, acting discriminatorily within the meaning of the *Steele* case, denies job opportunities to certain employees in the bargaining unit, thereby "restrains" or "coerces" such employees in the exercise of a right guaranteed them by Section 7. We believe that if the right of nondiscriminatory representation is deemed to be included in Section 7, then the language of Section 8 (b) (1) (A), on its face, is broad enough to comprehend action by a labor organization, in violation of that right, which results in denying employees job opportunities, or in causing them to be demoted. Where labor organizations have utilized their control over job opportunities to deny jobs to employees in violation of rights manifestly comprehended by Section 7, *e. g.*, the right not to be a member

[3] Cf. *National Labor Relations Board* v. *Graham Ship Repair*, 159 F. 2d 787, 788 (C. A. 9); *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 532–533 (C. A. 6); *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853–854 (C. A. 8).

of a labor organization, the Board has held that such conduct by the union violates Section 8 (b) (1) (A), and that the employer's acquiescence therein violates Section 8 (a) (1). *Clara-Val Packing Co.*, 87 NLRB 703, 704–705, enforcement denied on other grounds, 191 F. 2d 556 (C. A. 9). Upon finding a violation of such a right, the Board is authorized to issue a cease and desist order, requiring the employer and the labor organization responsible for the loss of employment, to take "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." Section 10 (c) of the Act. The broad powers of relief conferred by this Section (see *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194) permit a full and adequate remedy against labor organizations and employers who impinge upon the rights of employees guaranteed by Section 7.[4] Consequently, the Board would be em-

[4] Moreover, although the Board has held that it is not authorized to order back pay for violations of Section 8 (b) (1) (A) accomplished by labor unions through blocking employees' ingress to their place of employment, because such an award "would be in the nature of damages" (*Colonial Hardwood Flooring Co.*, 84 NLRB 563, 565), it has emphasized that it is fully appropriate to require unions to pay back pay where "losses in pay [are] suffered by [employees] because of severance of or interference with the tenure or terms of the employment relationship." *Ibid.*, pp. 565–566. Accordingly, in the Board's view, back pay would be authorized in a situation where restraint and coercion caused employees the loss of their jobs (*Steele* case, 323 U. S. 192), demotion (*Tunstall* v. *Bro. of Firemen*, 323 U. S. 210; cf.

powered to afford adequate relief to employees who are victimized by discriminatory representation practices.

However, the absence of any indication in the legislative history that Congress intended by enacting Section 8 (b) (1) (A) to provide an administrative remedy for conduct by a labor organization which violates its statutory obligation of equal representation, leads to serious doubt whether Sections 7 and 8 (b) (1) (A) should be so construed. Thus, although the *Steele* case was decided more than two and one-half years before the enactment of the 1947 amendments, Congressional consideration of Sections 7 and 8 (b) (1) (A) at that time included no reference, so far as our research reveals, to the problem of nondiscriminatory representation. The kind of union conduct which the legislative debates and committee reports show that Congress hoped to reach by Section 8 (b) (1) (A) included "threats of reprisal against employees and their families in the course of organizing campaigns * * * [and] mass picketing and other violence,"[5] "making threats or false promises or false statements,"[6] "a threat that if a man did not join, the union would raise the initiation fee * * * [or that] the union would get a closed-shop agreement and

Graham v. *Bro. of Firemen*, 338 U. S. 232), or as in this case, layoffs resulting from inferior seniority standing.

[5] Sen. Rep. No. 105, 80th Cong., 1st Sess., p. 50.

[6] 93 Cong. Rec. 4016.

keep him from working at all,'" and "the coercion of goon squads and other strong-arm organizing techniques which a few unions use today."[8] As the Board has stated, "This legislative history strongly suggests that Congress was interested in eliminating physical violence and intimidation by unions or their representatives, as well as the use by unions of threats of economic action against specific individuals in an effort to compel them to join." *National Maritime Union*, 78 N. L. R. B. 971, 985. While this legislative history shows that Congress wished to protect employees against economic as well as physical reprisal by unions generally, it does not indicate that Congress contemplated that the right of employees to receive fair and equal treatment from their bargaining representative would be brought within the scope of that protection. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 490, 491, 501; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212.

We think this fact particularly weighty since the consequence of holding that Section 8 (b) (1) (A) protects employees against unequal representation is to transfer jurisdiction to remedy infringements of that right by exclusive bargaining agents from the district courts to the Board. Since the Wagner Act contained no provisions prohibiting unfair labor practices by labor organi-

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[7] 93 Cong. Rec. 4435.

[8] 93 Cong. Rec. A 2252.

zations, it would appear that under that Act, as under the Railway Labor Act, jurisdiction to redress violations of the duty to accord equal representation was vested in the district courts. If Congress had consciously intended by the enactment of Section 8 (b) (1) (A) to transfer jurisdiction to remedy such violations from the district courts to the Board, the legislative history might be expected to reveal some evidence of such an intention.

In these circumstances, the Board urges only that if this Court should construe Section 7 as comprehending the right to fair and equal representation and should further find that Section 8 (b) (1) (A) and Section 8 (a) (1) are applicable to violations of this character, the traditional exclusiveness of the Board's jurisdiction over unfair labor practices should obtain.

C. *The scope of Section 8 (b) (3)*

Arguably, the action of an exclusive bargaining representative in refusing to execute a contract unless the employer agrees to provisions which unfairly discriminate against a portion of the bargaining unit might constitute a refusal to bargain in violation of Section 8 (b) (3).[9] In

[9] This would be the consequence of taking at face value the sole reference to non-discriminatory representation which we have been able to find in the legislative history of the 1947 amendments. Thus, Representative Hartley, in describing on the floor of the House the rights bestowed on em-

applying this Section, the Board has consistently held that the insistence by an employee representative, over the objections of an employer, upon a contract provision "which is unlawful or inconsistent with the basic policy of the Act, is a refusal to bargain in violation of the Act." *American Radio Association*, 82 N. L. R. B. 1344, 1346. This principle has been applied most often in situations where the insistence has been on some form of illegal union security arrangement,[10] but no valid reason appears why it should not be equally applicable where the arrangement sought is violative of other policies of the Act,[11] including that which prohibits discriminatory representation. In such cases the Board might properly order a labor organization to cease and desist from such conduct. See cases cited in n. 10, and 11, *supra*.

However, this remedy would clearly be inadequate to redress violations of the duty to accord

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ployees by H. R. 3020, the forerunner of the amendments in the House, stated that the provision requiring unions to bargain in good faith with employers (Section 8 (b) (2) of H. R. 3020) guaranteed to an employee "the right to require the union that is his bargaining agent to represent him without discriminating against him in any way or for any reason, even if he is not a member of the union." 93 Cong. Rec. 3425. No further congressional discussion of this assertion occurred. Compare Note, 65 Harv. Law Rev. 490, n. 46, p. 494.

[10] See *e. g., National Maritime Union*, 78 N. L. R. B. 971; *Great Atlantic & Pacific Tea Co.*, 81 N. L. R. B. 1052; *Essex County District Council*, 95 N. L. R. B. 969, 972.

[11] Compare *Chicago Typographical Union No. 16*, 86 N. L. R. B. 1041, 1042–1043.

equal representation where, as in this case, the employer did not object but agreed to the union's proposal. Where illegal provisions are included in a contract by voluntary agreement of the employer and the union, the Board has held that there is no violation of Section 8 (b) (3).[12]

D. *Apart from the possible remedy under Section 8 (b) (1) (A), and Section 8 (a) (1), suggested above, the Act does not provide an administrative remedy for violation of the duty to afford non-discriminatory representation adequate to divest the district courts of jurisdiction*

While the Board has not had occasion to decide whether its jurisdiction to adjudicate unfair labor practice cases includes authority to hear cases involving violations of a bargaining agent's duty to accord impartial representation to the employees for whom it speaks, it has recognized and enforced this duty in its administration of representation proceedings. Thus, because Section 9 (a) of the Act grants a certified bargaining agent the exclusive power of representation within the unit, the Board has indicated that it will not issue a certification under Section 9 (c), and that it will revoke an outstanding certification, where it is shown that the majority choice

[12] See, *Longshoremen's and Warehousemen's Union*, 90 N. L. R. B. 1021, 1023; cf. *Nassau County Typographical Union #915*, 87 N. L. R. B. 1263.

does not comply with the obligation of fair representation which is concomitant with its exclusive status. See, *e. g., Larus & Brother Co.*, 62 N. L. R. B. 1075, 1081–1083; *Carter Mfg. Co.*, 59 N. L. R. B. 804, 805–806; *RKO Pictures*, 61 N. L. R. B. 112, 116; *Bethlehem Alameda Shipyard, Inc.*, 53 N. L. R. B. 999, 1016; *Monsieur Henri Wines, Ltd.*, 44 N. L. R. B. 1310. This practice, of course, would not be affected either by a holding that the Board has exclusive jurisdiction to remedy violations of this obligation, or that the district courts have such jurisdiction.

However, the relief obtainable from the Board in representation cases is limited to depriving unions of the benefit of certifications. A transgressing union remains free to enter into discriminatory contracts and to inflict economic injury on employees in the bargaining unit by unfair exertion of its power of representation. Accordingly, as with the similar authority over representation cases which is exercised by the Mediation Board under the Railway Labor Act, this remedy is not alone adequate to deprive district courts of jurisdiction in unfair representation cases. See *Steele* case, *supra*, 323 U. S. at pp. 205, 207.

CONCLUSION

For the reasons stated, if this Court should conclude that the allegations of the complaint in this case, if proved, establish a violation of either Section 8 (b) (1) (A), 8 (a) (1) or 8 (b) (3), and

that the Board possesses authority adequately to remedy such violation, we respectfully submit that the judgment of the court below should be reversed and the cause remanded for dismissal on the ground that the Board has exclusive primary jurisdiction over the subject matter. On the other hand, if the Court affirms the jurisdiction of the district court, we respectfully submit that a violation by an exclusive representative of its statutory duty to represent the employees for whom it bargains fairly and impartially be held not to constitute an unfair labor practice.

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DECEMBER 1952.

The Board itself has never passed on the question of whether discriminatory action by a statutory collective bargaining representative outside of the legitimate scope of its bargaining territory would constitute an unfair labor practice. The Board thus far has determined only that, in the exercise of its powers under Section 9 to certify the collective bargaining representative, it will not regard itself as being precluded from taking appropriate remedial action such as a re-determination of the bargaining unit or a revocation of the certification where it finds discrimination being practiced. (*RKO Radio Pictures, Inc.*, 61 NLRB 112.)

The Board, in fact, has never used the power which it asserted in the *RKO* case and in similar cases insofar as we are aware. It certainly has not yet decided that it has the additional power to prevent discrimination by determining that such discrimination constitutes an unfair labor practice under the Section 8(b)(1) declaration that it is an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7."

We frankly do not know whether the Board will or should find that improper discrimination between employees by a collective bargaining representative constitutes such restraint or coercion against those employees as to fall within Section 8(b)(1). It seems to us that the question is a difficult one which the Board should be permitted to decide in the first instance.

If discrimination which violates Section 7 does not also constitute an unfair labor practice in violation of Section 8(b)(1)—an undecided question upon which we express no opinion—the only remedy before the Board for illegal discrimination seems to us to be quite inappropriate. If a union does discriminate unlawfully, an appropriate remedy would be one which would rectify the discrimination. But the only remedy which the Board itself has as yet asserted is withdrawal of the union certification. Such withdrawal would give small solace to the employees against whom the discrimination had been directed, since the employer would be free to continue it in the absence of any collective bargaining representative. At the same time, the union might be punished

far beyond the requirements of the situation. Withdrawal of certification would be a death sentence for the union involved, a remedy which may be far out of proportion to the wrong found to be committed against the employees and which would not, in any case, prevent continuation of the wrong.

The argument that the federal courts have no primary jurisdiction to enforce the requirement, implied in the Act, that a union exercise its statutory functions without discrimination must, therefore, rest either on the proposition that such discrimination constitutes an unfair labor practice or upon the proposition that the withdrawal of certification is an appropriate and exclusive remedy. Both of these propositions, it seems to us, are difficult ones which should be determined, at least in the first instance, by the National Labor Relations Board. An attempt by this Court at this time to sketch out the whole outline of the Board's jurisdiction in this kind of a case would, we think, be most undesirable. Yet the Court cannot make the negative finding that a federal District Court does not have jurisdiction unless it first affirmatively delineates the Board's jurisdiction and then holds that jurisdiction to be exclusive. Since the case can, we believe, be disposed of without deciding these questions, we urge the Court to limit its decision and to leave these troublesome questions for later determination in a case in which such determination is necessary.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1952

No. 194

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, *Petitioner*

vs.

GEORGE HUFFMAN, INDIVIDUALLY, ETC., ET AL., *Respondent*

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

CONSENT TO FILE

This brief *amicus curiae* is submitted by the Congress of Industrial Organizations with the consent of the parties, as provided for in Rule 27 of the Rules of this Court. It is submitted by the CIO because the decision of the Court of Appeals for the Sixth Circuit, if permitted to stand, will have a serious and perhaps disastrous effect upon the conduct of collective bargaining negotiations by all unions in the United States of America.

THE DECISION BELOW

It is important to recognize that the decision of the Sixth Circuit in this case has nothing to do with veterans' reemployment rights as established by the Selective Service and Training Act, 50 U.S.C., Sec. 308. Although Huffman's suit

was based alternatively on the claim that his layoff was a violation of his rights as a veteran under that Act, this alternative claim was rejected both by the District Court and by the Court of Appeals. The claim upon which the Court of Appeals held that he was entitled to relief was based solely on Section 7 of the National Labor Relations Act, as amended.

The opinion of the Court below does refer repeatedly to the alleged discrimination against veterans like Huffman, but its decision will afford relief not only to veterans, but to all employees having a length of continuous service equal to that for which Huffman is given credit under the collective bargaining agreement (including, in Huffman's case, the period of time he served in the armed forces). The suit was, in fact, brought by Huffman on behalf of a group of 275 employees at the Louisville plant of the Ford Motor Company. These employees, denominated "Class A" in the complaint (R. 5), were not alleged to be veterans. They were alleged to have only one common characteristic—that their place on the seniority roster was lower than that of the "Class B" employees (R. 5). The "Class B" employees *are* all alleged to be veterans. Their common characteristic is that they were all hired by Ford after they had completed military service and after the "Class A" employees were hired. They had, however, entered military service before the "Class A" employees were hired by Ford. They, therefore, were placed on the seniority roster ahead of the "Class A" employees because the collective bargaining contract gave them seniority credit, when they were hired after their discharges, for the period of their prior military service.

The decision of the Sixth Circuit, upholding the claim of the "Class A" employees against this contract provision is not, therefore, a decision upholding the rights of veterans against non-veterans, or even veterans against other veterans. It upholds a claim of the employees generally against certain veterans who were given special treatment because of their service. It is not based on the Selective Service and Training Act. It rests solely upon the finding that the special seniority credit given to veterans, not employed by Ford prior to their military service, constitutes discrimination against all of the

other employees whose job rights are thereby diminished, and the conclusion of law that such discrimination constitutes a violation of Section 7 of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the federal courts have primary jurisdiction to enforce the statutory obligation of unions not to discriminate in the administration of the collective bargaining authority granted to them by Section 7 of the National Labor Relations Act, as amended.

2. Whether the particular seniority system here involved constitutes discrimination under the federal Act.

ARGUMENT

I. *There Is Here No Illegal Discrimination.*

The substantive issue here presented is well stated by counsel for Huffman in his brief in opposition to the petition for certiorari. It is there said on pages 11-12: "The gravamen of the complaint is that the scope of the bargaining went outside the province of the matters within the legitimate interest of the bargainers and into forbidden territory."

The issue thus posed as to what is a legitimate interest of the bargainers in a collective bargaining relationship, and what, on the other hand, is forbidden territory, is a fundamental and important one. The resolution of that issue involves considerations having meaning not only to unions and their members but to our entire society.

What has happened, in this case, is this: The nation had passed through a war. The community recognized that it owed a debt to those who had served it in time of war. Appeals were made by the government and other agencies to the various groups which compose our society that they rise above their selfish interests and voluntarily make special provision to compensate those who had served in the war for the loss of status and opportunity which they necessarily suffered because of that service.

Certain statutory rules were passed which afforded to veterans a minimum protection of their existing relative seniority

status, but those rules were not enough. Particularly, veterans who had entered military service before they had opportunity to establish a place on the seniority rolls still remained at a disadvantage compared to men, like Huffman and the other "Class A" employees here, who went to work while these veterans were in service. It was urged, but not ordered, that private interests and private groups supplement these statutory rules by giving additional protection to such returning servicemen.

The Statement of Employment Principles issued by the Retraining and Reemployment Administration of the Department of Labor[1] is not evidence of authority in conflict with the decision of the Sixth Circuit. Its significance is precisely that it carried no authority. It was an appeal, formulated by the government after consultation with representatives of labor, industry and the veterans, for voluntary action to accomplish certain objectives which were agreed upon as desirable from the viewpoint of the community as a whole. The contract provision held to be illegal here was a direct response to that appeal. What the contract did was to give special seniority credit, and hence job protection against other employees, to those whom the community asked be so protected.

One of the central problems of our times is posed by the necessity of either persuading or coercing the particular interest groups, which necessarily make up our whole community, to consider, in the pursuit of their own interests, the interests of the community. Coercion by law means governmental interference with the conduct of private relationships. Such interference becomes necessary precisely to the degree that private groups fail to exercise their freedom from regulation with an awareness of their responsibilities, not only to themselves and their constituents, but also to the scale of values of the larger community.

We have in this case precisely the kind of voluntary action by a group in an effort to coordinate its own interests with the national interest that is so often sought for and so rarely achieved. We need not agree with the UAW in their method of recognizing community values. But the decision of the Court

[1] Appendix B to the UAW's petition for certiorari in No. 114.

of Appeals for the Sixth Circuit here is, in effect, that the action of the UAW violates the law for the very reason that it takes into consideration such community values in addition to the narrow individual interests of the members of the group.

The significance of the decision of the Court of Appeals in this case, therefore, rises far beyond any question of veterans rights. The question at issue really is whether unions venture into "forbidden territory" when they recognize the social values of the community and negotiate provisions with employers which give recognition to those values by conferring increased benefits upon those who, in the community scale of values, are deserving of such protection. The Court of Appeals says that unions may not do this. Contract provisions negotiated by unions, it says, are invalid unless they have "relevance to terms and conditions of work or the normal and usual subjects of contracts between union and employer" (R. 37). Attempts to satisfy broader social interests are described as "well-meaning desires" (R. 35) which will not justify any difference in the distribution of the benefits negotiated by the Union. Such contracts are "not justified by the lack of definite malice or hostility" (R. 35). If the effect is to give some employees greater benefits than others "the end result . . . is the same as if there had been deliberate hostility" (R. 36).

The philosophy underlying the decision of the Court of Appeals would clearly identify such union action as a no-strike pledge during time of war as outside the legitimate scope of the bargaining agent's authority. Such an action would not itself constitute discrimination, under the Court's decision, because it would not involve some special benefit to a particular class of employee as against another but, rather, the subordination of the interests of all to the national interest. But union action to provide special benefits for the aged, the crippled, those with large numbers of dependents, and similar groups which unions may feel it is socially desirable to give advantage to, do involve special benefits for some at the expense of others. A good union, conscious of the needs of society and its responsibilities to the community, will attempt in its own way, guided by the will of its membership, to give

recognition to the claims for preference which it may believe these groups legitimately have. But according to the Court of Appeals for the Sixth Circuit, if it embodies this preference in a collective bargaining contract it violates the National Labor Relations Act.

The question of seniority which is involved here is one in which the choice between individuals, which unions necessarily must make, is particularly obvious. Seniority systems are sets of rules to govern the choice between individuals in filling a limited number of jobs. Normally unions strive for the principle that, in making this choice, length of service shall govern on such matters as layoff and promotion. Apparently the modification of this principle necessarily involved in an agreement upon seniority units would pass the test set forth by the Court of Appeals. A layoff of Employee A with 20 years of service, while Employee B with one year of service remains working, is apparently acceptable to the Court of Appeals if the distinction between them is that they are in different seniority units, since such a distinction is required for efficient production.

A similar difference in treatment based on the fact that the junior employee is a union official also meets the test of the Sixth Circuit. But the reason stated is that the preferred employee in this case is in a special position to provide benefits to all of the members of the union. Absent that reason, no matter what the social desirability of the preference may be, it is to be forbidden as discriminatory.

What happens, under such reasoning, to other grants of special seniority rights to particular classes? Many labor contracts provide, for example, that employees who become partially disabled shall have a special right to cross seniority units and thus displace employees holding jobs within the newly limited capabilities of the disabled employees. Is this "discrimination"? Would it be illegal to give married employees with dependents preference, on layoff, over bachelors? Was it illegal to give veterans who volunteered credit for the time spent in military service at the time when the Selective Service Act provided such protection only for draftees?

All unions may not agree upon the contractual desirability

of adopting these systems of employee preference. We do not say that the special system of preference for veterans negotiated by the UAW is the only permissible system, or even the most desirable system. The essence of the kind of voluntary action necessary for the preservation of our free society is that each group be given some latitude in determining for itself how it will recognize and meet the needs of the community. Certain kinds of action are forbidden as anti-social. Other actions may be required by law, as the minimum necessary to meet the needs of the community. But, in the vast area between these extremes, reliance must be had in a free society upon voluntary recognition by the individuals and groups that make up the community of the interests and values of that community. We do say, therefore, that a union is not required by law to abjure consideration of what it believes in good faith, and on good evidence, is the national interest, nor required to limit itself solely to the equal advancement of the narrow interests of each of its members. So long as a union does not offend the basic values of the community, it should be free to negotiate with employers for whatever distribution of benefits it believes in good faith will best serve both the individual interests of its members and the community.

Seen in this light, the seniority system here condemned by the Court of Appeals lies at the opposite pole from that condemned by this Court in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192. The objective sought to be achieved by the union there was properly condemned, not because the union's view was too broad, but because it was too narrow. It is not simply a difference between distinctions among employees based on reasonable and upon unreasonable grounds. Here special benefits were given to some pursuant to a broad program recognized as desirable by considerable segments of the community. There, the effort was to impose a limitation on some members of the group, a limitation so socially undesirable as to be forbidden to governmental authority by the Constitution itself.

We frankly do not think that it is remotely possible that this Court will agree with the Court of Appeals that the special benefits given to veterans in the contract negotiated

by the UAW and the Ford Motor Company constitute illegal discrimination against all other employees adversely affected. Our primary concern is that this Court, in reversing the Court of Appeals, should recognize the social values necessarily involved here.

The CIO has attempted to build unions conscious of the needs not only of their members but of the community in which these members live. Unions do serve the immediate needs of their members. But they also owe allegiance to, and should attempt to serve, the nation as a whole. Recognition of the right of unions to contract with employers for special benefits to veterans is, therefore, not enough. What deserves recognition, particularly in view of the language of this Court in the *Steele* case, upon which the Court below relied (R. 37), is the right of unions, on behalf of their membership, to serve, as best they see them, social purposes broader than the direct hand to mouth improvement of the wages, hours and working conditions of their individual members.

II. *The Court Should Not Decide the Jurisdictional Question Presented by the Petition for Certiorari.*

The UAW argues strongly that the Court of Appeals, in deciding this case, has usurped the jurisdiction of the National Labor Relations Board. In the view of the UAW, the primary jurisdiction of the National Labor Relations Board to determine violations of the federal Act is exclusive and the decision below should, therefore, be reversed, irrespective of whether there in fact exists in this case any violation of Section 7 of the Act.

It is, of course, true that solution of the jurisdictional question which has been raised here is prior in logic to discussion of the merits of the case. And, if the Court should feel that it is required to pass upon the jurisdictional question, we would agree with the contentions of the UAW that the federal courts do not have primary jurisdiction in this kind of a case. But we believe that there are cogent reasons why the Court should reverse the decision below solely on the ground that the Court of Appeals erred in finding discrimination in this case without passing upon its jurisdiction to make that finding.

Our reason for urging this course upon the Court is that, in our view, the substantive question of discrimination is relatively easy of solution and will dispose of the case. The jurisdictional question, however, poses very difficult questions in a relatively uncharted field, any resolution of which may prove ultimately to create serious problems in the administration of the federal Act.

In order to determine whether or not the federal district court had jurisdiction to make the primary determination as to discrimination, the Court must make several determinations as to the meaning and application of the National Labor Relations Act without the aid of any prior consideration or determination of these questions by the agency charged with administering that Act. We believe the Court should avoid decision of those questions unless it is necessary that they be decided in order to dispose of the case before the Court.

In this branch of the argument we assume as given the proposition that discrimination between employees by the statutory collective bargaining representative constitutes a violation of the statute. Although the point has never been decided by this Court under the National Labor Relations Act, as amended, it has been decided under the Railway Labor Act. (*Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192). We assume that the rule of that case with regard to the substantive question of discrimination is equally applicable to the National Labor Relations Act, as amended.

The assumption that discrimination would violate Section 7 of the National Labor Relations Act, however, does not necessarily require the conclusion that the exclusive remedy for this violation lies with the National Labor Relations Board. While it is true, as stated by the UAW, that the Act, unlike the Railway Labor Act, does provide for administrative remedies for unfair labor practices, it is also true that the National Labor Relations Board is not expressly given authority to police violations of Section 7. Section 10(a) of the Act empowers the Board to prevent the unfair labor practices listed in Section 8 of the Act. But it is not necessarily true that all violations of Section 7 also constitute unfair labor practices under Section 8.